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In the Supreme Court of the United States

Supreme Court, U.S.
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MICHAEL RODAK, JR.

OCTOBER TERM, 1972

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SAVAIR MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SAVAIR MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, *infra*, pp. 11–16) is reported at 470 F. 2d 305. The decision and order of the National Labor Relations Board (Pet. App. C, *infra*, pp. 18–29) are reported at 194 NLRB No. 44. The hearing officer's report (Pet. App. D, *infra*, pp. 30–39) and the Board's decision in the related representation case (Pet. App. E, *infra*, pp. 40–42) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, *infra*, p. 17) was entered on December 11, 1972. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that a union's offer to waive initiation fees for all employees who sign union authorization cards before a Board representation election, if the union wins the election, does not tend to interfere with employee free choice in the election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> SECTION 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> SECTION 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *
>
> * * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), * * *

* * * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

A. PROCEEDINGS BEFORE THE BOARD

In September 1970, pursuant to a representation petition filed by Mechanics Educational Society of America (the "Union") under Section 9(c)(1) of the National Labor Relations Act, an election by secret ballot was conducted among the production and maintenance employees of the Savair Manufacturing Company (the "Company"). The Union won the election by a vote of 22–20 (App. E, *infra*, p. 40). The Company filed objections to the election, alleging that the Union representatives had improperly coerced

certain employees by leading them to believe that "if they failed or refused to sign a card requesting an election and the union was successful, they would be fined from" $20 to $200 before they could join the union (Pet. App. D, *infra*, p. 30). After an evidentiary hearing, a hearing officer issued a report recommending that the Company's objections be overruled, and that the Union be certified as the employees' representative. The hearing officer found in pertinent part as follows:

Prior to the filing of the representation petition, Bennie McKnight, an active employee-organizer and a Union observer at the election, told employees that, if the Union won the election, they would be subject to an initiation fee or a "fine"[1] if they did not sign an authorization card.[2] When the employees ques-

[1] Two employees, Bridgeman and Rice, testified that McKnight had used the word "fine" (A. 68–69, 83–84). The hearing officer found, however, that Bridgeman's testimony as a whole reflected such a "proclivity to confuse and interchange the characterizations 'fine' with 'initiation fee' [see A. 52–53, 90, 92–93] * * * that there is insufficient evidence based upon Bridgeman's testimony that a threat of a 'fine' occurred either before or after the filing date of the petition" (Pet. App. D, *infra*, p. 34). He further found that McKnight's conversation with Rice occurred before the filing of the petition and was thus irrelevant under the Board's decision in *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (Pet. App. D, *infra*, p. 34).

[2] The card, which was to be used to obtain a Board election, was an application for membership in the Union and also authorized the Union to represent the employee in collective bargaining (A. 101, 104). The Board requires that a representation petition filed by a labor organization be supported by a showing that at least 30 per cent of the employees in the unit have authorized the organization to represent them. 29 C.F.R. 101.17, 101.18.

tioned McKnight about the Union's policy, he told them to call Alfred Smith, the Union's Secretary-Treasurer (Pet. App. D, *infra*, p. 33; A. 51, 55–57, 58, 83–85, 87–91, 94–95[3]). After the representation petition was filed, Smith addressed a group of about 20 employees at an organization meeting. In response to a question about the initiation fee, Smith answered that there was a "small fee,"[4] but that if the Union won the election the initiation fee would be waived for all employees who signed cards before the election[5] (Pet. App. D, *infra*, p. 33; A. 51–52, 57–58, 92–94, 99–101.)

The hearing officer concluded that "what the Union did through Smith and through McKnight was to inform employees that an initiation fee would be waived in the eventuality of a successful election for the Union" (Pet. App. D, *infra*, p. 35).[6] Following the Board's decision in *DIT-MCO, Inc.*, 163 NLRB 1019, that a waiver of initiation fees prior to an election was not an improper inducement to vote for the union, regardless of whether it was contingent upon the results of the election,[7] the hearing officer concluded that

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[3] "A." refers to the appendix filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

[4] The Union's initiation fee is $10 or less (A. 100).

[5] The waiver, however, was not contingent upon how the employee actually voted in the election (A. 93).

[6] He added that whatever confusion may have existed with respect to the terminology utilized by McKnight prior to the filing of the petition (see n. 1, *supra*) was subsequently eliminated by Smith at the organization meeting (Pet. App. D, *infra*, p. 35).

[7] In *DIT-MCO* the Board overruled its earlier decision in *Lobue Bros.*, 109 NLRB 1182, that a waiver of initiation fees, contingent upon the union winning the election, was impermissible.

the Union's waiver offer did not interfere with free choice in the election (Pet. App. D, *infra*, p. 36).

The Company filed exceptions to the hearing officer's report with the Board. The Board sustained the hearing officer's findings and recommendations, and certified the Union as the representative of the Company's employees (Pet. App. E, *infra*, pp. 40–42).

Upon the Company's refusal to bargain, the Union filed an unfair labor practice charge with the Board's General Counsel, who issued a complaint alleging that the Company had violated Sections 8(a)(5) and (1) of the Act (A. 22–27). When the Company's answer (A. 31–33) indicated that it was merely seeking to relitigate issues which had been resolved in the representation proceeding, the General Counsel filed a motion for summary judgment with the Board (A. 34). The Board granted the motion, sustained the allegations of the complaint, and ordered the Company to bargain with the Union, upon request (Pet. App. C, *infra*, pp. 18–29).

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals denied enforcement of the Board's order (Pet. App. A, *infra*, pp. 11–16). The court adhered to its earlier decision in *National Labor Relations Board v. Gilmore Industries*, 341 F. 2d 240, upholding the reasoning of the Board in *Lobue* (see, n. 7, *supra*). The court stated (Pet. App. A, *infra*, p. 15):

> We simply refuse to believe that the waiver of initiation fees, contingent upon the outcome of an election, whether it is referred to as a fine, an assessment, or a waiver of initiation fees, is

not coercive in the context of a union election. The facts of this case indicate that *Lobue* and *Gilmore* are sound decisions, and we conclude that the Board abused its discretion in declining to follow the *Gilmore* decision.

REASONS FOR GRANTING THE WRIT

The decision below that a union's offer to waive initiation fees for employees who sign union authorization cards prior to a Board election is impermissible where it is contingent upon the union's winning the election is erroneous and is in direct conflict with the decisions of other courts of appeals. In these circumstances, and since the issue is a recurrent one in the administration of the Act, review by this Court is warranted.

1. As the court below acknowledged (Pet. App. A, *infra*, p. 15), its holding is in direct conflict with the decision in *National Labor Relations Board* v. *DIT-MCO*, 428 F. 2d 775, 778–779 (C.A. 8), and *National Labor Relations Board* v. *G. K. Turner Associates*, 457 F. 2d 484, 489 (C.A. 9). In *DIT-MCO*, the Eighth Circuit held that the Board had acted "within its discretionary powers to regulate the conditions under which an election may validly be held" in abandoning the distinction, previously drawn in *Lobue*, "between an unconditioned promise to waive union initiation fees for those employees signing cards before the election and a similar promise conditioned, however, upon a union election victory" (428 F. 2d at 779). In *Turner Associates*, the Ninth Circuit agreed with the "*DIT-MCO* court * * * that the Board's new policy was within its discretionary power to regulate election

conduct" (457 F. 2d at 489). The court below, on the other hand, adhered to the view, first expressed in *National Labor Relations Board* v. *Gilmore Industries*, 341 F. 2d 240, that "the waiver of initiation fees, contingent upon the outcome of an election * * * is * * * coercive * * *," and "respectfully decline[d] to follow" the decisions of the Eighth and Ninth Circuits. (Pet. App. A, *infra*, p. 15).[*]

2. "Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives." *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767. At an early date, the Board recognized that a union's offer to waive initiation fees before a Board election was a legitimate membership-recruiting and campaign technique, which did not interfere with employee free choice in the election. *The Root Dry Goods Co. d/b/a The Root Store*, 88 NLRB 289, 290–291; see also, *The Gruen Watch Co.*, 108 NLRB 610, 612. In *Lobue Bros.*, 109 NLRB 1182, however, the Board held that, where the waiver was conditioned upon the union's success in the election, it would have an impact on employee free choice in the election.

After further reflection, the Board, in *DIT-MCO*, 163 NLRB 1019, concluded that "no real distinction exists between a situation where the union offers to waive or reduce the initiation fees, but nothing is said about the election results, and one where, as in *Lobue*, the waiver is expressly conditioned on the outcome of

[*] The Sixth Circuit has held, however, that a waiver of initiation fees is not coercive where it is not expressly conditioned upon election results. See *National Labor Relations Board* v. *Gafner Automotive & Machine, Inc.*, 400 F. 2d 10, 12.

the election" (*id.* at 1021). The Board noted that, "whether expressly told so or not, an employee must recognize that as a practical matter the waived or reduced initiation fee can become of value to him only if the union wins the election." *DIT-MCO, supra,* 163 NLRB at 1021. Moreover, the Board held that "the *Lobue* theory rests on a faulty premise: that a reduction or waiver of initiation fees, contingent upon the union winning the election, constitutes a promise of benefit which improperly induces or coerces employees to vote for the union" (*ibid.*). The Board explained (*id.* at 1021–1022):

> it is obvious that employees who have received or been promised free memberships will not be required to pay an initiation fee, *whatever the outcome of the vote.* If the union wins the election, there is by postulate no obligation; and if the union loses, *there is still no obligation,* because compulsion to pay an initiation fee arises under the Act only when a union becomes the employees' representative and negotiates a valid union-security agreement.[9] * * *

3. The technique of waiving or offering specially reduced initiation fees during an organizational campaign has traditionally been used by unions to attract new members. The question when that tactic ceases to be permissible and constitutes an interference

[9] In rejecting the Board's *DIT-MCO* holding in this case, the court below assumed that the Board was contending that, "when the Board changed its position from *Lobue* to *DIT-MCO*, it effectively overruled this Court's decision in *Gilmore*" (Pet. App. A, *infra*, p. 13). The Board, however, merely contended that, in the light of the reasons it gave in *DIT-MCO*, the court should reconsider its decision in *Gilmore* and decline to follow it.

with employee free choice in the selection of a representative has been, and continues to be, the subject of much litigation before the Board and the courts of appeals. In addition to the cases cited at pp. 7–8, *supra*, see *DeVilbiss Co.*, 102 NLRB 942; *Otis Elevator Co.*, 114 NLRB 1490, 1493; *A. R. F. Products*, 118 NLRB 1456, 1458–1459; *Weyerhauser Co.*, 146 NLRB 1, 5. See also, *Amalgamated Clothing Workers* v. *National Labor Relations Board*, 345 F. 2d 264, 267–268 (C.A. 2); *National Labor Relations Board* v. *Gorbea*, 328 F. 2d 679 (C.A. 1); *National Labor Relations Board* v. *Crest Leather Mfg. Corp.*, 414 F. 2d 421, 423 (C.A. 5). The decision of the court below creates an uncertainty in this important area which warrants resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1973.

APPENDIX A

No. 72-1225

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. SAVAIR MANUFACTURING COMPANY, *Respondent.*	ON APPLICATION for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed December 11, 1972.

Before: CELEBREZZE, PECK and KENT, Circuit Judges.

PECK, Circuit Judge. This case is before the Court upon a petition by the National Labor Relations Board for enforcement of its order issued against the respondent Savair Manufacturing Company. On September 22, 1970, an election by secret ballot was conducted among the Company's production and maintenance employees, which the Union (The Mechanics Educational Society of America) won by a vote of 22 to 20, with one ballot challenged and one ballot declared void. The Company then filed timely objections to conduct which it contended affected the results of the election, alleging, *inter alia*, that the Union deceived employees into believing that they would be fined an unspecified amount if they failed to sign an authorization card and if the Union won the election.

An evidentiary hearing was held before a Hearing Examiner to resolve the issues raised by the Company. In recommending that the Company's objections be overruled, the Hearing Examiner found that there was insufficient evi-

dence upon which to conclude that such a threat occurred either before or after the filing date of the representation petition. He also found that the Union offered to waive the initiation fee for all employees who executed authorization cards prior to the election should the Union win the election, but that this offer of waiver was not objectionable under the Board's policy enunciated in *DIT-MCO*, 163 NLRB 1019, enf'd. *N.L.R.B.* v. *DIT-MCO*, 428 F.2d 775 (8th Cir. 1970). He concluded that the election was not improperly conducted, and that the Union is the exclusive representative of all employees in the unit for the purpose of collective bargaining. The Company's petition for rehearing was denied, and the Board subsequently granted summary judgment against the Company and ordered it to bargain with the Union. The Company has refused to do so, and the Board has brought this petition for enforcement of its order.

In *Lobue Bros.*, 109 NLRB 1182 (1954), the Board held that a pre-election offer of reduced initiation fees is objectionable when the promised benefit is contingent on how the employees voted in the election or on the results of the election. In *N.L.R.B.* v. *Gilmore Industries*, 341 F.2d 240 (6th Cir. 1965), this Court adopted the reasoning of the Board in *Lobue* and held that the economic inducement offered by a union in waiving initiation fees for those employees who sign authorization cards if the union wins the election impeded a reasoned choice because, under the circumstances of that case, the employees had been led to believe that they were receiving an economic benefit far greater than was actually the case. (See also *N.L.R.B.* v. *Gafner Automotive and Machine, Inc.*, 400 F.2d 10 (6th Cir. 1968).)

In *DIT-MCO*, *supra*, the Board changed its policy, overruled *Lobue*, and held that an offer to waive initiation fees for those who sign authorization cards prior to an election is permissible whether or not it is conditioned upon the outcome of the election. The Eighth Circuit enforced the Board's order and held that the Board's new policy of not setting

aside an election when a waiver or provisional waiver of union initiation fees, whether contingent upon the results of an election or not, was within the Board's discretionary powers to regulate the conditions under which an election may validly be held. 428 F.2d at 779.

In response to the Board's petition to enforce its order, the Company relies upon this Court's decision in *Gilmore*. The Board contends that the *Gilmore* case is no longer viable because in that case the court relied upon *Lobue*, which has since been re-examined and overruled by the Board. In presenting this argument, the Board displays a misunderstanding of the relationship which exists between the Board and this Court. The Board's actions are premised upon the assumption that when the Board changed its position from *Lobue* to *DIT-MCO*, it effectively overruled this Court's decision in *Gilmore*, and that this Court must follow the Board's lead and alter its decision in *Gilmore* accordingly. Such is not the case, and we find no reason, either procedurally or substantively, to alter our decision in *Gilmore*.

We note that while there is no question of fact concerning the offer to waive the initiation fees contingent upon the Union's victory in the election, there was some controversy as to whether or not this procedure was represented to the employees in terms of a "fine." The Hearing Examiner's findings on this issue indicate the confusion concerning initiation fees, fines and assessments that can be generated in the minds of those involved in a Union election:

> "According to the uncontradicted testimony of Bridgeman, it appears that McKnight, in obtaining signatures from employees of union membership and authorization cards, told employees that they would be subject to a fine or an assessment fee if they did not sign the card in the eventuality that the union won the election. There was, therefore, a great deal of discussion among the employees as to whether they should sign the union authorization and membership card in view of the fact

that regardless of their desires and how they would actually vote, they could save themselves some money in the event the union were successful. No specific amount was mentioned. Bridgeman used the word 'fine' interchangeably with 'assessment' and 'initiation fee.' His testimony is not entirely clear that McKnight used the word 'fine'. In any event, prior to the filing of the petition, because of the questions raised by employees, according to Bridgeman, McKnight telephoned Smith to find out what the union's policy was. The next day, employees asked McKnight whether it were true that they would have to pay a 'fine', McKnight answered in the affirmative and said that the employees could call Mr. Smith if they so desire and he gave them the telephone number. Subsequent to the filing of the petition, an employee meeting was held at a rented hall under the supervision of Mr. Smith at which approximately 20 employees were in attendance. According to Bridgeman, at the meeting the benefits of unionization were discussed and questions were invited from the floor. An employee asked Mr. Smith: . . . if there was a fee, not fine, we can't call it a fine, to join, and an initiation fee.' And: 'If there was a fee, you know if you didn't sign the slip [union authorization and membership card] and it was, in turn, [sic.] in before the election. There is a small fee, it was never stipulated what amount the fee should be.' According to Bridgeman, Smith answered: 'There would be a small fee.' No amount, according to Bridgeman, was ever specified. Bridgeman further testified that subsequent to that meeting, and prior to the election, Bennie McKnight told employees that if they signed the union membership and authorization card before the election, there would be no union 'initiation fee' if the union were successful at the election. Bridgeman was recalled to the stand twice. The second time he was recalled, he testified that McKnight referred to a 'fine' after the filing of the petition but was unable to specify the circumstances such as the contexts of the conversations and when and where they occurred. Under

these circumstances and because of his proclivity to confuse and interchange the characterizations 'fine' with 'initiation fee', it is my finding that there is insufficient evidence based upon Bridgeman's testimony that a threat of a 'fine' occurred either before or after the filing date of the petition. Upon cross-examination, Bridgeman conceded that what Smith said at the meeting was that an initiation fee would be waived for all card signers who executed their cards before the election in the eventuality that the union won the election."

As indicated by the Hearing Examiner's report, most of the facts concerning the misrepresentation to the employees were not considered by the Board because this conduct occurred prior to the filing of the petition, and the Board has determined that conduct occurring prior to the filing of a petition will not be grounds for setting aside an election. *Goodyear Tire and Rubber Co.*, 138 N.L.R.B. 453 (1962). We do not reach an examination of this policy because we do not agree with the Board that *Gilmore* should be overruled. We simply refuse to believe that the waiver of initiation fees, contingent upon the outcome of an election, whether it is referred to as a fine, an assessment, or a waiver of initiation fees, is not coercive in the context of a union election.

The facts of this case indicate that *Lobue* and *Gilmore* are sound decisions, and we conclude that the Board abused its discretion in declining to follow the *Gilmore* decision. Accordingly, upon a consideration of the arguments presented by both sides to this petition for enforcement, we respectfully decline to follow the Eighth Circuit (*N.L.R.B.* v. *DIT-MCO, supra*), and the Ninth Circuit (*N.L.R.B.* v. *C. K. Turner Associates*, 457 F.2d 484 (9th Cir. 1972)), noting that in neither of these cases was the Court called upon to overrule a controlling precedent of its own.

We have considered the other two arguments which the respondent has presented to this Court, and we conclude that they are without merit. The record indicates that the Board's

conclusion that a full and fair hearing was provided to the Company, and its conclusion that an illiterate employee was not precluded from casting a valid vote by the actions of the NLRB representative at the election are supported by substantial evidence on the record as a whole.

Enforcement of the Board's order is denied.

APPENDIX B

United States Court of Appeals for the Sixth Circuit

No. 72-1225

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SAVAIR MANUFACTURING COMPANY, RESPONDENT

ORDER

[Filed December 11, 1972]

Before CELEBREZZE, PECK, and KENT, *Circuit Judges.*

On petition to enforce an order of the National Labor Relations Board.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by the Court that enforcement of the order of the National Labor Relations Board is denied.

It is further ordered that Respondent recover from Petitioner the costs on appeal as itemized below.

Entered by order of the Court.

JAMES A. HIGGINS, *Clerk.*

Issued as Mandate: January 12, 1973.

Costs: None.

A true Copy.

Attest:

JAMES A. HIGGINS, *Clerk.*

APPENDIX C

DECISION AND ORDER

(November 23, 1971)

Upon a charge filed on April 12, 1971, by Mechanics Educational Society of America, AFL-CIO, herein called the Union, and duly served on Savair Manufacturing Company, herein called the Respondent, the Acting General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 7, issued a complaint on June 30, 1971, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on March 3, 1971, following a Board election in Case 7-RC-10098 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about March 5, 1971, and at all times thereafter, Respondent has

1. Official notice is taken of the record in the representation proceeding, Case 7-RC-10098, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151; *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On July 12, 1971, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 14, 1971, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 22, 1971, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent did not file a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint Respondent denies that the Union is the exclusive collective-bargaining representative of its employees in the stipulated appropriate unit or that it is obligated to bargain with the Union since the Board had not afforded it a full and impartial hearing on its objections to the election in the underlying representation proceeding, Case 7-RC-10098. We find no merit in Respondent's position.

The record in Case 7-RC-10098 indicates that, pursuant to a Stipulation for Certification Upon Consent Election, a secret ballot election was conducted among the employees in the stipulated unit in which 22 votes were cast for, and 20 against, the Union and 1 ballot was challenged. Thereafter, Respondent filed timely objections to conduct affecting the results of the election and the Union filed an "Answer to Objections to Election." After a preliminary investigation, the Acting Regional Director ordered a hearing upon the Respondent's Objections 1 through 4. At the hearing, Respondent moved to withdraw its Objection 3 and adduced no evidence in support of its Objection 2. Testimony was taken with respect to Objections 1 and 4 which related, respectively, to the Union's alleged threats to fine employees who failed to sign authorization cards prior to the election, and to the Board agent's alleged refusal to permit an observer to assist an illiterate employee who, consequently, cast a void ballot. In his Report on Objections and Recommendation, the Hearing Officer recommended that the Board overrule Objections 1, 2, and 4, approve the withdrawal of Objection 3, and issue a certification to the Union. Respondent filed timely exceptions to the Hearing Officer's Report.

On March 3, 1971, the Board issued a Decision and Certification of Representative in which it adopted the Hearing Officer's findings and recommendations and certified the Union as the exclusive bargaining agent of Respondent's employees in the stipulated unit. Respondent, on April 12, 1971, filed a document entitled "Petition to Set Aside Certification of Representative and Request for

a Rehearing on Objections to Election." Respondent asserted that it had just learned that prior to hearing certain employees had notified the Regional Director that they wished to object to the election; that the Regional Director did not explain to the employees that they were allowed to appear at the hearing; and that the Board failed to notify the Respondent of these employee objections. The Board, on June 17, 1971, concluding that the employees were not parties with standing to file objections, denied the Respondent's petition as lacking in merit.

Respondent's contentions herein present the same representation issues which had been considered and determined by the Board in the antecedent representation proceeding in Case 7-RC-10098.

It is well settled that in the absence of newly discoverd or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previ-

2. See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

ously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[3] We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent, a Michigan corporation, with its principal office and place of business in Warren, Michigan, and another installation in Detroit, Michigan, is engaged in the manufacture, sale, and distribution of machine parts and related products. During the calendar year 1970 Respondent had a gross revenue in excess of $500,000 and purchased and had delivered to its installations steel and other goods and materials valued in excess of $50,000 directly from points outside the State of Michigan.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

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3. In its Answer to the Complaint, the Respondent leaves to proof the Union's status as a labor organization and the appropriateness of the stipulated unit. As these issues were determined by the Board in the underlying representation case, they are not subject to litigation herein.

II. The Labor Organization Involved

Mechanics Educational Society of America, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by the Employer at its plants at 24488-24536 Gibson Drive, Warren, Michigan, and 10900 Charlevoix Street, Detroit, Michigan, but excluding office clerical employees, guards, foremen, and all other supervisors as defined in the Act.

2. The certification

On September 22, 1970, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 7, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on March 3, 1971, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about March 5, 1971, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-

bargaining representative of all the employees in the above-described unit. Commencing on or about March 5, 1971, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since March 5, 1971, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusion of Law

1. Savair Manufacturing Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Mechanics Educational Society of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Employer at its plants at 24488-24536 Gibson Drive, Warren, Michigan, and 10900 Charlevoix Street, Detroit, Michigan, but excluding office clerical employees, guards, foremen, and all other supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 3, 1971, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 5, 1971, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Savair Manufacturing Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Mechanics Educational Society of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by the Employer at its plants at 24488-24536 Gibson Drive, Warren, Michigan, and 10900 Charlevoix Street, Detroit, Michigan, but excluding office

clerical employees, guards, foremen, and all other supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plants in Warren and Detroit, Michigan, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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4. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C.

Edward B. Miller, Chairman
Howard Jenkins, Jr., Member
Ralph E. Kennedy, Member
(Seal) National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Mechanics Educational Society of America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees employed by the Employer at its plants at 24488-24536 Gibson Drive, Warren, Michigan, and 10900 Charlevoix Street, Detroit, Michigan, but excluding office clerical employees, guards, foremen, and all other supervisors as defined in the Act.

Savair Manufacturing Company
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226, Telephone 313-226-3200.

APPENDIX D

Hearing Officer's Report on Objections and Recommendation

(November 12, 1970)

A Notice of Hearing issued by the Acting Regional Director for the Seventh Region of the National Labor Relations Board on October 8, 1970. A hearing was held before me on October 28, 1970, at Detroit, Michigan. The hearing was conducted in accordance with the provisions of Section 102.69(e) of the Board's Rules and Regulations, Series 8, as amended. All the parties were presented and afforded full opportunity to be heard, to examine the witnesses, to introduce relevant evidence and to present oral argument at the close of the hearing.

In the Notice of Hearing, the Acting Regional Director ordered that the hearing be held for the purpose of resolving issues raised by Employer's Objections to Election, numbers 1 through 4. The Objections are set forth verbatim as follows:

1. That the Union, and persons acting on its behalf, through misrepresentations, trickery and threats deceived certain employees into believing that if they failed or refused to sign a card requesting an election and the union was successful, they would be fined from Twenty and 00/100 ($20.00) Dollars to Two Hundred and 00/100 ($200.00) Dollars, before they could become members of that union, which acts interfered with the employees' right to exercise a free choice.

2. That the union, and persons acting on its behalf, through misrepresentations and threats, deceived the employees into believing that if they signed a card their name was on record with the N.L.R.B., and they had agreed to vote for the union and they could not change their vote at the time of the election.

3. That the union and others acting in its behalf, circulated and distributed information just prior to the election that they could guarantee to the employees that they would receive a wage scale comparable to the tool and die shops in the area, when in fact these employees are employed in semi-production general type machine shop.

4. That the N.L.R.B.'s representative restricted the observers from assisting any employee and then failed to assist illiterate employees, and as a consequence, their ballot was either voided or did not express their true intent.

The objecting party, the Employer moved at the hearing to withdraw its Objection No. 3. It is recommended that the Board approve Employer's request to withdraw Objection No. 3.

With respect to Objection No. 2, no evidence was adduced in support of that Objection and I recommend that the Board therefore overrule Objection No. 2.

The Employer produced testimony of six employee-witnesses to support its objections. Two of these witnesses, Stafford and Neck testified with respect to Objection No. 4. With respect to Objection No. 1, only two witnesses testified in regard to campaign trickery or threats relating to the fining of an employee who failed to sign union authorization cards prior to the election. Of these two witnesses, Bridgeman was twice recalled and gave the most extensive testimony. According to Bridgeman's testimony, two agents of the

Union made reference to this fine or assessment. They were Secretary-Treasurer of the Union Alfred Smith, who conducted employee organizational meetings, and Bennie McKnight an employee card solicitor who campaigned on behalf of the Petitioner. The agency of Smith is not disputed. However, the Petitioner claims that McKnight, as an unpaid card solicitor and employee of the Employer, should not be construed to have acted as an agent on behalf of the Petitioner. The record clearly establishes that McKnight was authorized to distribute authorization cards on behalf of the Petitioner and was, in fact, the chief employee organizer acting on behalf of the Petitioner. The record also establishes that Smith, who appears to have been in charge of the Petitioner's organizing efforts authorized McKnight to explain the Petitioner's initiation fee policy to employees, after Smith had become aware that questions were being raised by employees on that issue. Under these circumstances, it would appear that, although McKnight was not a paid employee of the Petitioner, he was, an agent of the Union and acting within the scope of his authority in representing the Petitioner's initiation fee policy, though he may have done so inaccurately. *Hampton Merchants Association,* 151 NLRB 1307.

According to the uncontradicted testimony of Bridgeman, it appears that McKnight, in obtaining signatures from employees of union membership and authorization cards, told employees that they would be subject to a fine or an assessment fee if they did not sign the card in the eventuality that the union won the election. There was, therefore, a great deal of discussion among the employees as to whether they should sign the union authorization and membership card in view of the fact that regardless of their desires and how they would actually vote, they could

save themselves some money in the event the union were successful. No specific amount was mentioned. Bridgeman used the word "fine" interchangeably with "assessment" and "initiation fee". His testimony is not entirely clear that McKnight used the word "fine". In any event, prior to the filing of the petition, because of the questions raised by employees, according to Bridgeman, McKnight telephoned Smith to find out what the union's policy was. The next day, employees asked McKnight whether it were true that they would have to pay a "fine", McKnight answered in the affirmative and said that the employees could call Mr. Smith if they so desire and he gave them the telephone number. Subsequent to the filing of the petition, an employee meeting was held at a rented hall under the supervision of Mr. Smith at which approximately 20 employees were in attendance. According to Bridgeman, at the meeting the benefits of unionization were discussed and questions were invited from the floor. An employee asked Mr. Smith: "* * * if there was a fee, not fine, we can't call it a fine, to join, and an initiation fee." And: "If there was a fee, you know if you didn't sign the slip [union authorization and membership card] and it was, in turn, [sic.] in before the election. There is a small fee, it was never stipulated what amount the fee should be." According to Bridgeman, Smith answered: "There would be a small fee." No amount, according to Bridgeman, was ever specified. Bridgeman further testified that subsequent to that meeting, and prior to the election, Bennie McKnight told employees that if they signed the union membership and authorization card before the election, there would be no union "initiation fee" if the union were successful at the election. Bridgeman was recalled to the stand twice.

The second time he was recalled, he testified that McKnight referred to a "fine" after the filing of the petition but was unable to specify the circumstances such as the contexts of the conversations and when and where they occurred. Under these circumstances and because of his proclivity to confuse and interchange the characterization "fine" with "initiation fee", it is my finding that there is insufficient evidence based upon Bridgeman's testimony that a threat of a "fine" occurred either before or after the filing date of the petition. Upon cross-examination, Bridgeman conceded that what Smith said at the meeting was that an initiation fee would be waived for all card signers who executed their cards before the election in the eventuality that the union won the election.

One other witness, employee Rice, testified that McKnight stated when soliciting that: "You would get fined if you did not [sign a card]." No amount was specified. Viewing this testimony in relation to Bridgeman's testimony, it would appear that McKnight made the statements with respect to the purpose of signing a card prior to the filing of the petition when he was soliciting the necessary showing of interest for the Union and it would appear to have occurred prior to the filing of the petition. In any event, it is my conclusion that the objecting party has failed to establish that the Union engaged in a threat to employees to assess a fine upon those who failed to sign cards on or after the filing date of the petition. Conduct, of course, occurring prior to the filing of the petition is not grounds for setting aside the election.[1] Whether or not a sufficient valid showing of interest was obtained, constitutes a matter for administrative determination. With respect to what transpired after the filing of the petition, Smith testified that he, at the

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[1] *Goodyear Tire and Rubber Co.*, 138 NLRB 453.

meeting, referred to by Bridgeman, told the employees that an *initiation fee* would be waived not only in the eventuality of the union winning the election, but also in the eventuality of the union negotiating a contract. There is no evidence, nor any contention, that the Union misrepresented to employees that they would have to become members immediately upon the certification of the union as bargaining agent.

In reviewing the testimony of the witnesses, it is clear to me that what the Union did through Smith and through McKnight was to inform employees that an initiation fee would be waived in the eventuality of a successful election for the Union. Whatever confusion may have existed with respect to terminology utilized by McKnight prior to the filing of the petition, it seems clear that this was the expressed policy as set forth at the initial organizational meeting after the filing of the petition. However, the Employer argues that the waiver of an initiation fee constitutes an economic inducement offered by the Union which impeded employees free choice. The Employer further argues that it is an economic inducement contingent upon how employees vote in the election and on the results of the election, and as such, constitutes an objectionable inducement. This argument, however, has been rejected by the Board. In the *DIT-MCO, Inc.*, 163 NLRB No. 147 case, the Board held that a provisional waiver of initiation fees prior to election is not improper regardless of whether it is contingent upon the results of the election. The Board pointed out that it would be unreasonable to conclude that a statement by the union during an election to the effect that an assessment of money or an obligation to pay money which could be avoided by the execution of a union membership card prior to the election, would influence a vote in favor of the Union when the simplest way to avoid the incurrence of any financial obligation

would be to vote "no". Thus, it would appear that any threat to impose a "fine", "assessment" or "initiation fee", or "payment to join the union", although it may induce an employee to execute a union authorization membership card, would more probably induce him to vote "no" at the election. It is my conclusion and recommendation, therefore, that the Employer has failed to show that the Union has engaged in conduct which would have interfered with the free choice of an election and, therefore, I recommend that the Board overrule Objection No. 1.

Objection No. 4

Employer's observer Raymond Neck, testified that at the election he was aware that employee Stafford was somewhat illiterate, but was unaware of the extent of his illiteracy and did not know that Neck would be unable to understand the ballot. In any event, Neck testified that Board Agent Bolton, in the presence of the two observers, including Bennie McKnight and Neck, instructed the voters on the manner in which they should cast their ballot. He did this as the voters approached the identification table. Stafford was included in a group of 6 or 7 voters waiting in line. Bolton orally instructed the voters as to the mechanics of voting. He then individually asked each of the 6 or 7 voters including Stafford whether they understood his instructions. According to Neck, he asked Stafford if he understood the instructions and that Stafford either nodded his head or answered "yes". Neck testified that he did not volunteer to assist Bolton in this instruction. The Employer's Counsel attempted to elicit testimony that Bolton instructed the observers not to speak to one another nor to the Board Agent, and therefore this was the cause of Stafford's failure to understand the voting procedure. Neck's testimony, however, reveals that Bolton told

the observers not to address the *employees,* and that he, Neck, assumed Stafford understood the instructions, and, therefore, made no attempt to advise the Board Agent of any further necessary instruction.

After Stafford received his ballot, he went into the booth and without unfolding his ballot, placed a mark on the unprinted back portion of the ballot which was exposed. He then returned and deposited the ballot. Thus, Stafford's ballot constituted the one void ballot cast in the election. Stafford testified that when he was standing in line to vote with about 6 other employees that: "I think the Board Agent was trying to tell me [how to vote] but I didn't understand." He testified that he didn't recall what the Board Agent said. When asked: "* * * did you vote?" He testified: "I didn't, I just marked the paper, I can't read, I didn't unfold it, I didn't want the Union." In cross-examination he testified:

> Q. Did you listen to him give them [the other voters] the instructions?
> A. No.
> Q. You weren't listening?
> A. No. He was talking about how to vote but I wasn't paying no attention.
> Q. In other words, you ignored him?
> A. Yes.

Stafford testified that when asked to sign a union authorization membership card, he told McKnight: "* * * Rather than pay, you can fill it out for me, I can't read or write. I don't want the Union but I don't want to pay if it comes in." Neither Bolton nor McKnight were called to testify.

Contrary to the Employer's argument, I find that the NLRB agent conducting the election did ask each voter individually whether he understood his instructions and that Stafford answered in the affirmative. Further, contrary to the Employer, I conclude that

the failure of the Employer's observer to offer assistance was not caused by any instruction of the Board Agent, but resulted from his own conclusion that Stafford did not need assistance beyond that given by the Board Agent.

The Employer further argues that the Union observer should have offered to assist Bolton in giving special instructions to Stafford, or at least should have disclosed the fact that Stafford could not read and write since Stafford advised him of this fact when McKnight filled out the Union authorization membership card. I do not agree with the Employer that either the Board Agent or any of the observers engaged in any conduct which deprived Stafford of the opportunity to cast an intelligent choice. At most, Stafford's testimony indicates that sometime apparently preceding the filing of the petition when McKnight was soliciting a showing of interest for the petition, McKnight was advised of Stafford's illiteracy. Afterwards, the petition was filed and an election campaign ensued. During the election campaign, the usual Board Notices, with replicas of the ballot were posted. It would be totally unjustified to expect that at the election McKnight should have concluded that despite Stafford's own positive assurance that he understood Bolton's instruction and despite his exposure to the sample ballots and the propagandizing of both parties that Stafford did not know how to cast his ballot. The Board Agent not only explained the mechanics of voting to a group of employees in close proximity as they waited to vote but he also made an individual effort in addressing each individual employee as to whether they specifically understood his instructions. Stafford answered in the affirmative.

Certainly the Regional Director is charged with the obligation of conducting elections under the highest standards possible to afford a free choice for all

voters. A failure to make clear the election procedure because of communication problems, such as inadequate instructions to foreign speaking voters where such problem was known to exist constitutes grounds to set aside the election. *Fibre Leather Mfg. Corp.*, 167 NLRB 393. However, it is my conclusion that the Employer has failed to establish that Stafford did not have the opportunity to cast a ballot because of the failure of the Board Agent or because of some trickery on the part of the observers. No amount of care and precaution can overcome such undisclosed resistance to instruction as exhibited by Stafford. I therefore recommend that Objection No. 4 be overruled. Cf. *Craft Manufacturing Co.*, 122 NLRB 341.

CONCLUSION

For the reasons stated above, it is recommended that the Board overrule Objections 1, 2 and 4, and approve the withdrawal of Objection No. 3 and issue a Certification that Mechanics Educational Society of America, AFL–CIO has been designated and selected by a majority of the employees of the above-named Employer in the unit herein involved as their representative for the purposes of collective bargaining and pursuant to Section 9(a), as amended, said organization is the exclusive representative of all employees in such unit for the purpose of collective bargaining with respect to rate of pay, wages, hours of employment, and other conditions of employment.

Dated at Detroit, Michigan, this 12th day of November, 1970.

(S) THOMAS R. WILKS.

THOMAS R. WILKS,

Hearing Officer, National Labor Relations Board, Seventh Region, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226.

APPENDIX E

Decision and Certification of Representative

(March 3, 1971)

Pursuant to a Stipulation for Certification Upon Consent Election approved on August 27, 1970, an election by secret ballot was conducted on September 22, 1970, under the direction and supervision of the Regional Director for Region 7 among the employees in the stipulated unit. At the conclusion of the election the parties were furnished with a tally of ballots which showed that of approximately 45 eligible voters, 44 cast ballots, of which 22 were for, and 20 against, the Petitioner, 1 was challenged, and 1 was declared void. The challenged ballot was not sufficient to affect the results of the election. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, the Regional Director conducted an investigation and, on October 8, 1970, issued and duly served upon the parties a Notice of Hearing upon the Employer's objections. After a hearing held on October 28, 1970, at which all parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Hearing Officer Thomas R. Wilks, in his Report issued on November 12, 1970 recommended that the objections be overruled. Thereafter, the Employer filed timely exceptions to the Hearing Officer's Report.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds that they are free from prejudiced error. The rulings are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2 (6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees constitute an unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintainance employees employed by the Employer at its plants at 24488–24536 Gibson Drive, Warren, Michigan, and 10900 Charlevoix Street, Detroit, Michigan, but excluding office clerical employees, guards, foremen, and all other supervisors as defined in the Act.

5. The Board has considered the Employer's objections, the Hearing Officer's Report, and the exceptions thereto, and hereby adopts the Hearing Officer's findings and recommendations.

Accordingly, as the tally shows that the Petitioner has obtained a majority of the valid ballots cast, we

shall certify it as the exclusive bargaining representative of the employees in the appropriate unit.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that Mechanics Educational Society of America, AFL–CIO, has been designated and selected by a majority of the employees in the unit found appropriate herein as their representative for the purposes of collective bargaining and that, pursuant to Section 9(a) of the Act, the said labor organization is the exclusive representative of all employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Dated, Washington, D. C., March 3, 1971.

[SEAL] EDWARD B. MILLER, *Chairman,*
HOWARD JENKINS, JR., *Member,*
RALPH E. KENNEDY, *Member,*
National Labor Relations Board.

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